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No. 05-353

In the Supreme Court of the United States

PEABODY WESTERN COAL COMPANY AND
PEABODY COAL COMPANY, LLC, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether joinder of the Navajo Nation under Federal Rule of Civil Procedure 19(a) was improper.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 400 F.3d 774. The opinion of the district court (Pet. App. 19a-48a) is reported at 214 F.R.D. 549.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2005. A petition for rehearing was denied on May 18, 2005 (Pet. App. 49a). On August 3, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 15, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Peabody Western Coal Company mines coal at the Black Mesa Complex on the Navajo and Hopi reservations in northeastern Arizona. Pet. App. 2a. Those mining operations are authorized by several leases between the Navajo and Hopi Tribes and petitioner's predecessor-in-interest. *Ibid.* The leases with the Navajo Nation state that petitioner "agrees to employ Navajo Indians when available in all positions for which, in the judgment of [petitioner], they are qualified." *Ibid.* Those leases have been approved by the United States Department of the Interior (DOI) pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a, 396e. See Pet. App. 3a; *United States* v. *Navajo Nation*, 537 U.S. 488, 493-494 (2003). The Navajo Nation has also enacted the Navajo Preference in Employment Act, 15 N.N.C. 601 *et seq.* See Pet. App. 30a. Section 604 of that Act requires "[a]ll employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation" to "[g]ive preference in employment to Navajos." *Ibid.*

2. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits any "employer" from discriminating in employment on the basis of, *inter alia*, "national origin." 42 U.S.C. 2000e-2(a)(1). Title VII's definition of the term "employer" specifically excludes "an Indian tribe." 42 U.S.C. 2000e(b). Title VII separately provides that "[n]othing contained in [Title VII] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." 42

U.S.C. 2000e-2(i). Respondent Equal Employment Opportunity Commission (EEOC or Commission) construes that exception to permit an employer operating on or near a reservation to give preference to Indians over non-Indians, but not to discriminate among the members of different Indian Tribes. See *EEOC: Policy Statement on Indian Preference Under Title VII*, 8 Fair Empl. Prac. Manual (BNA) 405:6647, 405:6653 (May 16, 1988).

Title VII authorizes private suits and also provides for enforcement by both the EEOC and the Attorney General. 42 U.S.C. 2000e-5(f). With respect to charges filed with the EEOC against public entities, Title VII states that, "[i]n the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court." 42 U.S.C. 2000e-5(f)(1).

3. Federal Rule of Civil Procedure 19(a) provides as follows:

> **(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a

> practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Fed. R. Civ. P. 19(a). Federal Rule of Civil Procedure 19(b) states in pertinent part that, "[i]f a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Fed. R. Civ. P. 19(b).

4. In June 2001, the EEOC filed suit in federal district court, alleging that petitioner had violated Title VII by refusing to hire qualified applicants who were members of non-Navajo Indian Tribes for positions at the mines operated by petitioners on reservation land. C.A. E.R. 1-5. The EEOC's complaint alleged that three such individuals had "filed charges of discrimination with the Commission alleging that [petitioner] had violated Title VII by refusing to hire them because they were Native Americans who were not members of the Navajo Nation." *Id.* at 2. The EEOC's complaint did not name the

Navajo Nation as a defendant in the action. See *id.* at 1-5.

Petitioner moved for dismissal of the EEOC's complaint and for summary judgment. Pet. App. 5a. Petitioner pointed to the Nation's absence and contended, *inter alia*, that Federal Rule of Civil Procedure 19 required dismissal of the suit because the Navajo Nation was a "necessary and indispensable party" whose joinder would not be feasible because the EEOC is not authorized to file suit against a Tribe. *Id.* at 5a, 32a. In response to petitioner's motion to dismiss the action, the EEOC moved to join the Nation as a defendant pursuant to Rule 19. Pet. 6.

The district court granted petitioner's motion and ordered that the case be dismissed. Pet. App. 19a-48a. The court noted the EEOC's concession that the Navajo Nation was a "necessary party" to the litigation—*i.e.*, that the Nation fell within one or both of the categories of persons described in Federal Rule of Civil Procedure 19(a)(1)-(2) who should be joined if joinder is feasible. See Pet. App. 34a. That concession was based on the Ninth Circuit's then-recent decision in *Dawavendewa* v. *Salt River Project Agricultural Improvement & Power District*, 276 F.3d 1150, cert. denied, 537 U.S. 820 (2002) (*Dawavendewa II*). See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment Pursuant to FRCP Rule 56, at 3-4 (Mar. 4, 2002). In *Dawavendewa II*, the court of appeals held, in a suit alleging a similar violation of Title VII brought by a *private plaintiff* (not the EEOC), that the Navajo Nation was a person to be joined if feasible under Federal Rule of Civil Procedure 19(a)(1), (a)(2)(i), and (a)(2)(ii), see 276 F.3d at 1155-1159; that the Nation's sovereign immunity rendered its joinder infeasible, see *id.* at 1159-

1161; and that the Nation was an "indispensable" party such that the private plaintiff's suit could not go forward in the Nation's absence, see *id.* at 1161-1163. The court specifically observed, however, that "tribal sovereign immunity does not apply in suits brought by the EEOC" because the Commission is an agency of the federal government. *Id.* at 1163.

The district court in the instant case held that joinder of the Nation was not feasible because (1) the EEOC lacks statutory authority to sue a governmental entity, and (2) an Indian Tribe is not an "employer" within the meaning of Title VII and therefore is not subject to suit under that statute. Pet. App. 35a-39a. The district court further held that the suit could not go forward in the Navajo Nation's absence because the Nation was an "indispensable" party within the meaning of Federal Rule of Civil Procedure 19(b). Pet. App. 39a-41a. The court found that the Nation's absence from the suit "would prejudice [petitioner] by preventing the resolution of its lease obligations." *Id.* at 40a. The court also stated that "any relief for the EEOC would come at the expense of the economic and sovereign interests of the Nation." *Ibid.* The district court therefore dismissed the Commission's lawsuit. *Id.* at 41a.

5. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-18a.

The court of appeals held that the Navajo Nation's connection to the action was such that the Nation should be joined in the suit if joinder was feasible. Pet. App. 9a-10a. The court stated:

> If the EEOC is victorious in its suit against [petitioner], monetary damages for the charging parties can be awarded without the Nation's participation. But declaratory and injunctive relief

> could be incomplete unless the Nation is bound by res judicata. The judgment will not bind the Navajo Nation in the sense that it will directly order the Nation to perform, or refrain from performing, certain acts. But it will preclude the Nation from bringing a collateral challenge to the judgment. If the EEOC is victorious in this suit but the Nation has not been joined, the Nation could possibly initiate further action to enforce the employment preference against [petitioner], even though that preference would have been held illegal in this litigation. [Petitioner] would then be, like the defendant in *Dawavendewa II*, 276 F.3d at 1156, "between the proverbial rock and a hard place—comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it."

Id. at 9a.

The court of appeals further held that it was feasible to join the Navajo Nation pursuant to Rule 19(a). Pet. App. 10a-15a. The court explained that the Nation's sovereign immunity would not prevent the district court from exercising jurisdiction because that immunity does not apply in a suit brought by a federal agency such as the EEOC. *Id.* at 10a. The court also rejected petitioner's contention (see *id.* at 10a-11a) that the Nation could not be joined because Indian Tribes are specifically exempted from Title VII's definition of "employer" and are not subject to enforcement actions by the EEOC. The court explained that "a plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19." *Id.* at 11a; see *id.* at 11a-12a (discussing cases).

The court of appeals acknowledged case law from other circuits suggesting, in other circumstances, that a party may not be joined as a defendant under Federal Rule of Civil Procedure 19(a) unless the plaintiff has a cause of action against it. Pet. App. 12a (citing *Vieux Carre Prop. Owners, Inc.* v. *Brown*, 875 F.2d 453, 457 (5th Cir. 1989), cert. denied, 493 U.S. 1020 (1990), and *Davenport* v. *International Bhd. of Teamsters*, 166 F.3d 356, 366 (D.C. Cir. 1999)). The court explained, however, that "the actual holdings of *Vieux Carre* and *Davenport* (as distinct from their abstract statement of the rule) can be reconciled with" the court of appeals' interpretation of Rule 19. *Ibid.* In both *Vieux Carre* and *Davenport*, "the issue was whether the court could join under Rule 19 and then *impose an injunction* directly on a party against whom the plaintiff could not state a cause of action." *Id.* at 12a-13a (emphasis added). In the instant case, by contrast, the EEOC "is not seeking any affirmative relief directly from" the Navajo Nation. *Id.* at 13a. Rather, the Commission seeks to join the Nation "for the sole purpose of effecting complete relief between the parties by ensuring that both [petitioner] and the Nation are bound to any judgment upholding or striking down the challenged lease provision." *Id.* at 14a (citation and internal quotation marks omitted).[1]

The court of appeals emphasized that it did "not decide, even implicitly, the merits of the EEOC's Title VII suit against [petitioner]," and stressed that the merits "determination is for the district court on remand." Pet.

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[1] Because the court of appeals concluded that joinder of the Navajo Nation was "feasible" within the meaning of Rule 19(a), it did not address the question whether the Nation was an "indispensable" party within the meaning of Rule 19(b). That question is therefore not presented by the decision below.

App. 15a; see *id.* at 18a ("We do not decide the merits of the EEOC's Title VII claims against [petitioner] today."). Accordingly, the court remanded the case for further proceedings. *Ibid.*

ARGUMENT

The EEOC brought this action against only petitioner and did not request joinder of the Navajo Nation until petitioner moved for dismissal of the case in the absence of the Nation. The court of appeals correctly held that joinder of the Nation in the unique circumstances of this case was not precluded by the fact that the EEOC would have been unable to sue the Nation directly under Title VII. The court of appeals' resolution of that narrow question is consistent with the text and purposes of Federal Rule of Civil Procedure 19(a), with this Court's decisions construing the Rule, and with the decisions of other circuits. Further review is not warranted.

1. Federal Rule of Civil Procedure 19(a) identifies particular categories of persons who should be joined in a pending lawsuit if joinder is "feasible." In particular, the Rule states that joinder, when "feasible," is appropriate

> if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple,

> or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Although it contends that the Navajo Nation was improperly joined in this case, petitioner does not challenge the court of appeals' determination (see Pet. App. 9a-10a) that the Nation falls within one or both of the two categories of persons described in Federal Rule of Civil Procedure 19(a)(1)-(2). Indeed, the EEOC sought joinder of the Nation in this case only after petitioner sought dismissal of the suit on the ground that the Nation was a "necessary and indispensable party." See p. 5, *supra*. Petitioner's practical interests would not be served, moreover, if the court of appeals' joinder determination were reversed on the ground that the Nation falls outside the categories defined by Rule 19(a)(1)-(2).[2] Petitioner's evident objective in challenging joinder is not to litigate this suit without the participation of the Nation, but—as its initial motion under Rule 19(b) makes clear—to obtain dismissal of the EEOC's claims against it on the ground that the Nation is an "indispensable" party whose joinder is "not Feasible." See Fed. R. Civ. P. 19(b). Because Rule 19(b) authorizes dismissal only when "a person *as described in subdivision (a)(1)-(2)* [of Rule 19] cannot be made a party," *ibid.* (emphasis added), an essential premise of petitioner's Rule 19(b) motion was that the Navajo Nation is "a person described in subdivision (a)(1)-(2)." Accord-

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[2] So long as the EEOC's claims against petitioner remain pending, joinder of the Nation cannot plausibly be considered prejudicial to petitioner's own interests. To the contrary, if the suit is allowed to go forward, joinder of the Nation will give petitioner an opportunity to ensure that its interests are protected and that it is not ultimately subjected to inconsistent legal obligations. See Pet. App. 9a.

ingly, the narrow question presented by the petition is whether, *assuming* that the Navajo Nation has a sufficient legal and practical connection to this case to bring the Nation within one or both of the categories defined by Federal Rule of Civil Procedure 19(a)(1)-(2), joinder is nevertheless precluded because the EEOC lacks an independent cause of action against the Nation under Title VII.

2. Petitioner's contention that joinder of the Navajo Nation is precluded in these unique circumstances has no textual basis in the language of Rule 19(a). The Rule states that a person encompassed by Rule 19(a)(1)-(2) "shall be joined as a party" if (i) the person is subject to service of process, and (ii) joinder will not deprive the court of subject-matter jurisdiction. See Fed. R. Civ. P. 19 Advisory Committee notes (1966) (28 U.S.C. App. at 697) ("If a person as described in subdivision (a)(1)(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party."). Petitioner does not argue that the Navajo Nation is insusceptible to service of process under Rule 19 in this case, nor does it contend that joinder of the Nation would deprive the district court of subject-matter jurisdiction. Nothing in the text of Rule 19(a) imposes the additional requirement, proposed by petitioner, that the EEOC have an independent cause of action against the Nation.

Petitioner's reading of Federal Rule of Civil Procedure 19(a), moreover, is inconsistent with this Court's decision in *Martin* v. *Wilks*, 490 U.S. 755 (1989). The plaintiffs in *Martin*, a group of white firefighters, sued the City of Birmingham under Title VII, alleging that they were unlawfully being denied promotions in favor

of less qualified African-American firefighters. *Id.* at 760. The City contended that its race-conscious employment decisions were required by consent decrees entered in a prior suit brought by other plaintiffs, and that the white firefighters' suit constituted an "impermissible collateral attack[] on the consent decrees." *Ibid.*

In holding that the plaintiffs' claims could go forward, this Court explained that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." 490 U.S. at 762. The Court rejected the contention that the white firefighters could be bound by the prior judgment because they had failed to intervene in a timely fashion in the lawsuit that had produced the consent decrees. *Id.* at 762-763. Rather, noting that Federal Rule of Civil Procedure 19(a) "provides for mandatory joinder in circumstances where a judgment rendered in the absence of a person may 'leave . . . persons already parties subject to a substantial risk of incurring . . . inconsistent obligations,'" 490 U.S. at 764, this Court concluded that "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree," *id.* at 765. The Court explained that

> [t]he parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in [by Rule 19 joinder] additional parties where such a step is indicated, rather than placing on potential

> additional parties a duty to intervene when they acquire knowledge of the lawsuit.

Ibid.

The clear thrust of the decision in *Martin* is that the parties to the original lawsuit that had produced the consent decrees could have ensured that the white firefighters were bound by the judgment in that suit by joining those individuals as parties pursuant to Federal Rule of Civil Procedure 19(a). The Court did not suggest, however, and the facts of the case give no reason to suppose, that any party to the original lawsuit would have had an independent legal claim against the white firefighters. The Court's decision in *Martin* therefore strongly indicates that the existence of a cause of action against the joined party is not a prerequisite to joinder under Rule 19(a).[3] Cf. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 356 n.43 (1977) (citing Rule 19(a) and holding that a union would remain in ongoing litigation as a defendant, notwithstanding the absence of any legitimate ground for holding the

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[3] Petitioner speculates (Pet. 28) that the plaintiffs to the original lawsuit at issue in *Martin* could have filed a declaratory judgment action against the white firefighters, and that the Court's discussion of Federal Rule of Civil Procedure 19 in that case is therefore consistent with petitioner's view that joinder under the Rule requires an independent cause of action against the person to be joined. A hypothetical anticipatory suit against the white firefighters, however, based on the *possibility* that those firefighters would ultimately object to entry of consent decrees providing for race-conscious employment practices, would not obviously present the "actual controversy" that the Declaratory Judgment Act requires. 28 U.S.C. 2201(a). In any event, while it made clear that joinder was an available option, the Court in *Martin* did not discuss the Declaratory Judgment Act or suggest that joinder of the white firefighters in the original lawsuit would have depended on the availability of a cause of action for declaratory relief.

union liable under Title VII, "so that full relief may be awarded the victims of the employer's * * * discrimination").

3. Contrary to petitioner's contention (Pet. 9-14), the ruling of the court of appeals in this case does not conflict with the decisions of the Fifth and District of Columbia Circuits in *Vieux Carre* and *Davenport*. Rather, this case differs from *Vieux Carre* and *Davenport* in three important (and related) respects. First, the plaintiffs in *Vieux Carre* and *Davenport* named particular entities as defendants in their original complaints, notwithstanding the plaintiffs' lack of any cause of action against those entities. The EEOC, by contrast, moved to join the Navajo Nation in this case only *after* petitioner sought dismissal of the suit on the ground that the Nation was a "necessary and indispensable party." See p. 5, *supra*. Second, while the plaintiffs in *Vieux Carre* and *Davenport* requested the entry of injunctions against the putative defendants, the EEOC "seek[s] no affirmative relief against the Navajo Nation." Pet. App. 13a. Third, in neither *Vieux Carre* nor *Davenport* did the court of appeals order the disposition that petitioner ultimately seeks—*i.e.*, dismissal of claims against an otherwise appropriate defendant pursuant to Federal Rule of Civil Procedure 19(b) on the ground that an "indispensable" party cannot be joined. See p. 10, *supra*. Those distinctions refute petitioner's claim of a "square circuit conflict" (Pet. 9 (heading)) on the question presented here.

a. Because of the different circumstances presented by *Vieux Carre* and *Davenport*, the decisions in those cases do not squarely address the issue presented here. The plaintiff in *Vieux Carre* was an association of property owners who sought to stop construction of an

aquarium and riverfront park in the French Quarter of New Orleans. 875 F.2d at 454-455. The association sued the United States Army Corps of Engineers (Corps) for declaratory relief, alleging that the Corps had violated the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. 403, and the National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.*, when it failed to require the developers to obtain a permit for those two projects and failed to submit the proposed projects to the NHPA review process. See 875 F.2d at 455. The plaintiff also sought injunctive relief against the developers and the local governmental entities responsible for authorizing the projects. *Ibid.*

With respect to the claims against the non-federal defendants, the Fifth Circuit "affirm[ed] the district court's dismissal of the [association's] requested injunction, finding that neither the [Administrative Procedure Act] nor the NHPA give a private plaintiff a right of action against any of the defendants other than the Corps." *Vieux Carre*, 875 F.2d at 456. As one basis for its holding that such injunctive relief was unavailable, the court stated that "it is implicit in Rule 19(a) itself that before a party will be joined * * * as a defendant the plaintiff must have a cause of action against it." *Id.* at 457. The Fifth Circuit in *Vieux Carre* had no occasion, however, to decide whether the existence of a cause of action is a prerequisite to joinder if a plaintiff does not seek injunctive or other affirmative relief against an entity sought to be joined.

b. *Davenport*, like *Vieux Carre*, involved the question whether the plaintiffs could invoke Federal Rule of Civil Procedure 19 as a basis for enjoining a defendant against whom no cause of action had been asserted. After a union president and an employer, Northwest Air-

lines, entered into an interim agreement temporarily modifying employees' flight and duty hours, several union members sued their local and national unions for breach of the unions' duties of fair representation under federal labor laws. 166 F.3d at 358-360. The complaint also named Northwest as a defendant and sought to enjoin Northwest from implementing the challenged agreement, but without stating any cause of action against Northwest in the complaint. *Id.* at 360. The court of appeals rejected the plaintiffs' contention that Rule 19 could serve as a basis for enjoining Northwest, stating: "It is not enough that plaintiffs 'need' an injunction against Northwest in order to obtain full relief. They must also have a right to such an injunction, and Rule 19 cannot provide such a right." *Id.* at 366.

c. In both *Vieux Carre* and *Davenport*, the courts of appeals held only that the plaintiffs could not obtain relief against parties as to whom the plaintiffs had no cause of action. Neither court conducted the inquiry mandated by Federal Rule of Civil Procedure 19(b) for cases in which "a person as described in subdivision (a)(1)-(2) [of Rule 19] cannot be made a party," and neither court held that claims against *other* defendants should be dismissed based on the infeasibility of joining an "indispensable" party. Petitioner, by contrast, has argued throughout this litigation that (i) the Navajo Nation is a person described in Rule 19(a)(1)-(2) despite the EEOC's lack of any cause of action against it, but (ii) the EEOC's lack of a cause of action against the Nation renders joinder not "feasible" within the meaning of Rule 19(a). Neither *Vieux Carre* nor *Davenport* provides any support for those contentions.

d. In an attempt to bring this case closer to *Vieux Carre* and *Davenport*, petitioner contends (Pet. 15) that

a judgment running against the Navajo Nation is the practical and legal equivalent of an injunction. That argument is incorrect.

An injunction is a "court order commanding or preventing an action," *Black's Law Dictionary* 800 (8th ed. 2004), and a party to such a court order may be subject to judicial sanctions for failure to comply. See *Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 443 (1986) (judicial sanctions in civil contempt proceedings may be employed to coerce a defendant into compliance with a court's order or to compensate a complainant for losses sustained). Notwithstanding the joinder of the Navajo Nation to this lawsuit, however, the judgment ultimately entered in the case will impose no duty on the Nation to undertake or refrain from undertaking any particular act, and it will not subject the Nation to potential sanctions for contempt. Rather, if the EEOC prevails on the merits of its Title VII claims—an issue that remains for remand—the only consequence of the Nation's joinder pursuant to Rule 19(a) will be to require courts to give the judgment appropriate preclusive effect if the legality of the tribal preference becomes a subject of contention in a future dispute to which the Nation is a party. See, *e.g.*, *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 125 S. Ct. 2491, 2500 n.16 (2005) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues * * * raised in that action."); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980).[4] To be

[4] Petitioner's reliance (Pet. 26-27) on 28 U.S.C. 2072(b) is misplaced. Section 2072(b) provides that the rules of practice and procedure promulgated by this Court "shall not abridge, enlarge or modify any substantive right." In *Martin*, this Court explained that "[j]oinder as a party * * * is the method by which potential parties are subjected to

sure, a judgment in the EEOC's favor would likely have a significant impact on the Navajo Nation's ability to obtain employment preferences for tribal members, but that effect is neither the practical nor the legal equivalent of an injunction against the Nation itself enforceable through the power of contempt.

4. Petitioner contends (Pet. 17-29) that joinder of the Navajo Nation in this case in response to petitioner's motion to dismiss is precluded by 42 U.S.C. 2000e-5(f)(1), which provides that enforcement of Title VII against governmental units is entrusted to the Attorney General rather than to the EEOC. That argument is incorrect.

a. Petitioner contends (Pet. 17-18) that "the plain language of Title VII prohibits the EEOC from seeking to resolve Title VII disputes with Indian tribes in court." The text of 42 U.S.C. 2000e-5(f)(1), however, is in fact much more limited in scope. It provides:

> If within thirty days after a charge is filed with the Commission * * * , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or politi-

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the jurisdiction of the court and bound by a judgment or decree." 490 U.S. at 765. The Court evidently did not believe that use of Rule 19(a) to achieve those objectives would "abridge, enlarge or modify any substantive right." Accordingly, because joinder of the Navajo Nation is not sought as a predicate for awarding any affirmative legal or equitable relief against the Nation, application of Rule 19(a) in these circumstances is not barred by Section 2072(b).

> cal subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

42 U.S.C. 2000e-5(f)(1).

Section 2000e-5(f)(1) does not address the situation presented here, which involves joinder of the Navajo Nation in an enforcement action brought by the EEOC against only *a private employer*. Rather, Section 2000e-5(f)(1) is by its terms addressed to the situation where a government entity is itself charged before the EEOC with employment discrimination in violation of Title VII. The word "respondent" in Section 2000e-5(f)(1) clearly refers to the entity that is the subject of an EEOC charge alleging a violation of Title VII. See 42 U.S.C. 2000e-5(b) ("Whenever a charge is filed * * * alleging that an employer * * * has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge * * * on such employer * * * (hereinafter referred to as the 'respondent')."). In filing charges of discrimination with the Commission, the private complainants alleged that *petitioner*, not the Nation, had violated Title VII. See C.A. E.R. 2; p. 4, *supra*. Similarly, the EEOC has not alleged in this case that the Nation itself has violated Title VII. For that reason, in the circumstances here, neither the underlying enforcement action against petitioner, nor the joinder of the Navajo Nation as a party to that action, triggers Section 2000e-5(f)(1).

b. Petitioner is also wrong in suggesting (*e.g.*, Pet. 20) that permitting joinder of a Tribe in this setting

would somehow subvert the congressional policy choice reflected in Section 2000e-5(f)(1)'s allocation of authority between the EEOC and the Attorney General. Joinder of the Navajo Nation as a party to the instant case does not expose the Nation to the remedies authorized by Title VII, nor does it rest on any allegation that the Nation itself has violated the statute. Rather, joinder of the Nation is ancillary to the EEOC's pursuit of Title VII remedies against a private employer—an enforcement action that the Commission has undoubted authority to undertake—and the EEOC did not seek joinder of the Nation until after petitioner had moved to dismiss this case because of the Nation's absence.[5]

c. Petitioner contends (Pet. 3) that "suits by the federal government against Indian tribes under Title VII * * * must be filed by the Department of Justice

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[5] Petitioner relies on three district court decisions rejecting efforts by the EEOC to join school boards to pending suits against teachers' unions. See Pet. 12-13 (citing *EEOC* v. *Elgin Teachers Ass'n*, 658 F. Supp. 624 (N.D. Ill. 1987), *EEOC* v. *American Fed'n of Teachers, Local No. 571*, 761 F. Supp. 536 (N.D. Ill. 1991), and *EEOC* v. *Oak Park Teachers' Ass'n*, 45 Fair Empl. Prac. Cas. (BNA) 444 (N.D. Ill. Dec. 31, 1985)). In those cases, however, the EEOC's claims against the teachers' unions arose out of discriminatory collective bargaining agreements that the unions had negotiated with their respective school boards. See *Elgin*, 658 F. Supp. at 624; *Local 571*, 761 F. Supp. at 537; *Oak Park*, 45 Fair Empl. Prac. Cas. at 445. Those suits therefore called into question the legality of the school boards' conduct *as employers covered by Title VII*. In dismissing the school boards from the EEOC's lawsuits, the district courts reasoned that because the school boards were governmental respondents, the EEOC was obligated under Title VII to "take no further action" against them and to "refer the case to the Attorney General" instead. See, *e.g.*, *Local 571*, 761 F. Supp. at 539. The instant case, by contrast, involves no challenge to the Navajo Nation's own employment practices. Rather, the EEOC's claim for relief is solely against a private employer (*i.e.*, petitioner).

rather than the [EEOC]." Title VII's definition of "employer," however, specifically excludes "an Indian tribe." 42 U.S.C. 2000e(b). If, as petitioner contends, an attempt to join the Navajo Nation as a party to a preexisting enforcement action against a private employer were the legal equivalent of a Title VII suit brought directly against the Nation, then neither the EEOC *nor* the Attorney General would be empowered to take that step, since Indian Tribes—including the Nation—are excluded from Title VII's definition of "employer."

Indeed, the apparent logical implication of petitioner's overall theory is that the legality of petitioner's employment preference for members of the Navajo Nation can *never* be effectively adjudicated by a federal court, either in a suit brought by the EEOC solely against a private employer such as petitioner, or in an enforcement action brought by the Attorney General. Petitioner clearly regards the Navajo Nation's connection to this case as sufficient to bring the Nation within one or both of the categories described in Federal Rule of Civil Procedure 19(a)(1)-(2), since petitioner initially moved for dismissal of the EEOC's suit and/or for summary judgment on the ground that the Nation was a "necessary and indispensable party." Pet. App. 32a. Petitioner construes Rule 19(a) to authorize joinder, however, only if the plaintiff has an independent cause of action against the party to be joined. Under that reading of the Rule, the Nation could not be joined in any Title VII suit against petitioner, regardless of the identity of the plaintiff, because the Nation is excluded from Title VII's definition of "employer."[6]

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[6] Petitioner obliquely suggests that the Attorney General would have a potential cause of action against an Indian Tribe under the "pattern

Petitioner's ultimate objective, moreover, is to obtain dismissal of this suit in its entirety on the ground that the Nation is an "indispensable" party within the meaning of Federal Rule of Civil Procedure 19(b), so that the Nation's insusceptibility to joinder will prevent the EEOC's claims against petitioner from going forward *at all*. See p. 10, *supra*. If petitioner's understanding of Rule 19 and Title VII were adopted by this Court, there would be no evident basis for a different result in an enforcement action brought against petitioner by the Attorney General. Neither Title VII nor Rule 19, however, immunizes a private employer such as petitioner from suit for unlawful employment discrimination.

As the court of appeals emphasized, petitioner is entitled to argue on remand that the circumstances under-

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or practice" provisions of Title VII, 42 U.S.C. 2000e-6(a). See Pet. 19, 23; Reorganization Plan No. 1 of 1978, § 5, 42 U.S.C. 2000e-4 note, at 621 (transferring to Attorney General from EEOC the authority to bring suit against public sector defendants under Section 2000e-6). That suggestion is problematic in at least two respects. First, it is not clear that the Nation's negotiation of mineral leases calling for employment preferences for tribal members would constitute a "pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII]," 42 U.S.C. 2000e-6(a), even if petitioner's use of the preference in its own hiring decisions were ultimately held to violate the statute. Second, Section 5 of the 1978 Reorganization Plan vests the Attorney General with authority over the "initiation of litigation with respect to State or local government, or political subdivisions under [42 U.S.C. 2000e-6]." 42 U.S.C. 2000e-4 note, at 621. Although Indian Tribes have governmental status and prerogatives, they are not States, and they are not naturally or routinely referred to as "local government[s]" or "political subdivisions." If authority to file "pattern or practice" suits against Indian Tribes has not been transferred to the Attorney General under the 1978 Reorganization Plan, then that authority rests with the EEOC. See 42 U.S.C. 2000e-6(e).

lying the hiring practices at issue here provide a defense to the EEOC's Title VII claim. But petitioner is wrong in suggesting that it need not even answer that claim.[7]

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[7] Petitioner contends (Pet. 22) that because the pertinent lease provisions were reviewed and approved by the Department of the Interior when they were first negotiated some 40 years ago, "the Nation and petitioner should be entitled to rely on the continuing validity of the federally approved preference provisions unless and until appropriate action is taken by the Department of Interior and/or Department of Justice." That argument goes to the merits of the EEOC's Title VII claim, which the court of appeals in this case pointedly declined to address. See Pet. App. 15a, 18a. On remand, petitioner may argue that its challenged employment practices did not violate Title VII because they were undertaken in conformity with leases entered into by the Navajo Nation in its sovereign capacity and approved by a federal agency (or for other reasons). The fact that the Interior Department approved the leases, however, has no bearing on the propriety of joining the Navajo Nation under Federal Rule of Civil Procedure 19(a).

The petition-stage brief for the United States in *Salt River Project Agricultural Improvement & Power District* v. *Dawavendewa*, No. 98-1628, argued that discrimination based on tribal affiliation is, generally speaking, a form of "national origin" discrimination within the meaning of Title VII. 98-1628 U.S. Br. at 6-10. The brief further contended that a preference for members of a particular Tribe is not covered by Title VII's Indian preference exemption, 42 U.S.C. 2000e-2(i). 98-1628 U.S. Br. at 10-15. The brief for the United States noted, however, that the court of appeals in that case had not addressed, and that review by this Court therefore was not warranted to consider, "the questions whether an on-reservation employer's preference for members of a particular Tribe in conformity with an ordinance of that Tribe (or the terms of a lease of the trust property of that Tribe) should be viewed as a political classification, whether such a preference should be viewed as having the effect of preferring persons on the basis of political affiliation rather than national origin, and whether, if viewed as having the effect of preferring persons on the basis of national origin, it could be justified as job related and consistent with business necessity." *Id.* at 9-10.

This Court denied the petition for a writ of certiorari in *Salt River*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

See 528 U.S. 1098 (2000). In its subsequent decision in *Dawavendewa II*, the Ninth Circuit confirmed that it had not yet addressed the potential legal justifications described above that might be proffered in defense of the hiring preference. See 276 F.3d at 1158. In any event, as discussed, the merits of the EEOC's claims are not presented by the interlocutory petition in this case.